

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In Re Simon II Litigation
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U.S. DISTRICT COURT E.D.N.Y.

★ SEP 19 2002 ★ 00-CV-5332

Related to

No. 98-CV-3287
No. 99-CV-1988
No. 00-CV-2340
No. 00-CV-4632

MEMORANDUM
AND ORDER

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JACK B. WEINSTEIN, Senior District Court Judge:	

I. Introduction

This memorandum and order addresses plaintiffs' application for class certification. See Third Amended Class Action Complaint and Supplemental Memorandum in Support Amended and Renewed Motion for Class Certification, dated July 26, 2002. Extensive briefing and argument by the parties on the issue have been considered. A more extensive explanation of this order will be filed as soon as work permits.

This order grants certification. It represents an attempt to provide a procedural solution to the problem of repetitive and unrelated judgments for punitive damages (limited by constitutionally required overall caps) in this massive and complex litigation.

Attorneys representing the class seek punitive damages for a class of:

All persons residing in the United States, or who were residents of the United States at the time of their deaths, who smoke or smoked Defendants' cigarettes, and who have been diagnosed by a physician with one or more of the following diseases from April 9, 1993 through the date notice to the class is ordered disseminated: lung cancer; laryngeal cancer; lip cancer; tongue cancer; mouth cancer; esophageal cancer; kidney cancer; pancreatic cancer; bladder cancer; ischemic heart disease; cerebrovascular heart disease; aortic aneurysm, peripheral vascular disease; emphysema; chronic bronchitis; or, chronic obstructive pulmonary disease (also called chronic air flow obstruction),

and excluding:

1. Persons who have obtained judgments or settlements against any or all Defendants;
2. Persons against whom any or all of the Defendants have obtained judgments;
3. Persons who are members of the certified class in Engle v. R.J. Reynolds Tobacco Co. No. 94-08273 CA-22 (Circuit Court of the 11th Judicial Circuit, Dade County, Florida).

Defense counsel has sensibly suggested that a fourth excluded group be persons whose diagnosis predates their use of tobacco.

The court certifies the class subject to modifications described in Part III, infra.

II. Procedural History

Related aspects of tobacco litigation pending in this court have been considered in deciding the certification issue. See, e.g., Mason v. American Tobacco Co., 212 F.Supp.2d 88 (E.D.N.Y. 2002) (dismissing claims brought under the Medicare Secondary Payer statute); In re Simon II Litigation, 212 F.Supp.2d 56 (E.D.N.Y. 2002) (application of Goshen to Blue Cross cases); In re Simon II Litigation, 212 F.Supp.2d 57 (E.D.N.Y. 2002) (application of Goshen to Bergeron case); In re Simon II Litigation, 212 F.Supp.2d 53 (E.D.N.Y. 2002) (severing Mason, denying transfer, and noting that the court would consider the merits of the claims); In re Simon II Litigation, 208 F.R.D. 490 (E.D.N.Y. Jul 03, 2002) (denying class certification in Bergeron); In re Simon II Litigation, 208 F.R.D. 488 (E.D.N.Y. Jun 26, 2002) (court will sua sponte consider dispositive motions in Mason); In re Simon II Litigation, 208 F.R.D. 487 (E.D.N.Y. Jun 17, 2002) (court will entertain dispositive motion in Mason); In re Simon II Litigation, 2002 WL 1315807 (E.D.N.Y. Jun 13, 2002) (discussion of Blue Cross stay); In re Simon II Litigation, 2002 WL 1315808 (E.D.N.Y. Jun 13, 2002) (scheduling); In re Simon II Litigation, 208 F.R.D. 484 (E.D.N.Y. Jun 10, 2002) (raising issues for discussion at conference); In re Simon II Litigation, 2002 WL 522984 (E.D.N.Y. Mar 28, 2002) (request of court for expeditious treatment of cases, with suggestions of questions for argument); In re Simon II Litigation, 2002 WL 862553 (E.D.N.Y. Apr. 23, 2002) (memorandum on possible approaches to resolution of tobacco cases with issues for discussion, see transcript of May 1, 2002); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 190 F.Supp.2d 407 (E.D.N.Y. 2002) (attorneys' fees to plaintiff following trial and jury awards for damages under New York General Business Law § 349(h)); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 178 F.Supp.2d 198 (E.D.N.Y. 2001) (following trial, refusal to dismiss a jury award for direct claims and subrogated claims of medical insurer

under New York General Business Law §349; statistical evidence appropriate; fraudulent actions triggering statute of limitations); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., No. 98-CV-3287, 2001 WL 1328414 (E.D.N.Y. Sept. 27, 2001). Considerations in determining statutory fees. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., No. 98-CV-3287, 2001 WL 1328458 (E.D.N.Y. Sept. 17, 2001) (fees hearing to be held after judgment on verdict); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., No. 98-CV-3287, 2001 WL 811930 (E.D.N.Y. May 22, 2001) (members of single conspiracy to mislead the public with respect to health risks from dates shown); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., 141 F.Supp.2d 320 (E.D.N.Y. 2001) (factual findings of a judge in separate case excluded as hearsay and unfair when sought to be used to impeach an expert); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., 138 F.Supp.2d 357 (E.D.N.Y. 2001) (insurer permitted to recover extra health care expenditures for smokers and to provide evidence of pass-on premium practice); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., 133 F.Supp.2d 162 (E.D.N.Y. 2001) (New York Business Law § 349 not applicable to activities before statute amended to permit private right of recovery, statistical evidence admissible under federal rules in Erie case, no federal preclusion of state claim, subrogation of punitive damages); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., 199 F.R.D. 487 (E.D.N.Y. 2001) (supplemental report of expert allowed to accommodate scientific process and search for truth); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., 199 F.R.D. 484 (E.D.N.Y. 2001) (parties permitted to play clips for jury from videotaped sample of smoker-subscribers without interruption of counter designations); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., 113 F.Supp.2d 345 (E.D.N.Y. 2000) (material issues re British holding company's direction of subsidiary efforts in

conspiracy; limits on Civil RICO claim; use of statistical evidence appropriate; subrogation under state law; treble damages under RICO; exclusion of future damages; no preemption); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., No. 98 CV 3298, 2000 WL 1880283 (E.D.N.Y. 2000) (Daubert exclusion of portion of expert's proposed statement based upon testimony in state court); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., No. 98 CV 3287, 2000 WL 1805359 (E.D.N.Y. 2000) (Daubert rulings based upon rulings in related cases); Blue Cross & Blue Shield of N.J., Inc., v. Philip Morris, Inc., No. 98 CV3287, 2000 WL 1738338 (E.D.N.Y. 2000) (Daubert rulings on experts); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., 53 F.Supp.2d 338 (E.D.N.Y. 1999) (enforcing disqualification agreement); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., 36 F.Supp.2d 560 (E.D.N.Y. 1999) (claim stated under RICO); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc., No. 98-CV-3287, 1999 WL 104815 (E.D.N.Y. Feb. 25, 1999) (no indispensable party; pleading sufficiently particular); Simon v. Philip Morris Inc., 200 F.R.D. 21 (E.D.N.Y. 2001) (bifurcation; severance not a violation of Seventh Amendment); Simon v. Philip Morris Inc., 124 F.Supp.2d 46 (E.D.N.Y. 2000) (conflict of laws: general liability under New York Law: depeage as needed); Simon v. Philip Morris Inc., No. 99-CV-1988, 2000 WL 1658337 (E.D.N.Y. Nov. 6, 2000) (preference for certification of Simon II); Simon v. Philip Morris Inc., 194 F.R.D. 73 (E.D.N.Y. 2000) (decision on certification reserved for further briefing); Simon v. Philip Morris, Inc., 86 F.Supp.2d 95 (E.D.N.Y. 2000) (long arm personal jurisdiction over BAT proper); In re Simon II Litigation, 172 F. Supp. 2d 375 (E.D.N.Y. 2001) (consolidation and test cases preceding certification); In re Simon II Litigation, apparently unpublished, 00 CV 5332 (E.D.N.Y. Oct. 23, 2000) (by order to show cause the court referred to perspective attorneys for

class and seven subclasses (a - g), seeking any objections to named attorneys and requiring publication); Simon v. Philip Morris, 99 CV 1988, 2000 WL 1745265 (E.D.N.Y. Nov. 16, 2000) (sampling of cases; Simon I v. Simon II as vehicles for disposition; choice of law applicable; manageability); In re Simon II, 00 CV 5332, 98 CV 0675, 99 CV 6142, 98 CV 1492, 97 CV 7658, 99 CV 1988, 98 CV 3287, 99 CV 7392, 00 CV 4632, 2000 WL 1252182 (E.D.N.Y. Sept. 6, 2000) (Order to show cause re: severance, stays and certification); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., No. 98-CV-1492, 2001 WL 477256 (E.D.N.Y. Feb. 27, 2001) (amendment to amend to press New York's Consumer Protection Act; certification of New York based funds premature); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., No. 98-CV-1492, 2000 WL 1424931 (E.D.N.Y. Sept. 26, 2000) (effect of Rule 23(f) appeals and stay pending decision of court of appeals); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., No. 98-CV-1492, 2000 WL 1364358 (E.D.N.Y. Sept. 20, 2000) (motion for certification denied; designation of single member of class for immediate trial permitted if plaintiff wishes); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., No. 98-CV-1492, 2000 WL 777834 (E.D.N.Y. June 13, 2000) (request by court for certification motion); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., 86 F.Supp.2d 137 (E.D.N.Y. 2000) (RICO service provision not applicable; long arm New York jurisdiction covers British holding company); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., 74 F.Supp.2d 221 (E.D.N.Y. 1999) (self insured ERISA trust fund had standing as subrogee of smokers); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., 74 F.Supp.2d 213 (E.D.N.Y. 1999) (insurers and funds slated subrogated claims under RICO); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., 71 F.Supp.2d 139 (E.D.N.Y. 1999) (discretionary power of district court to deny interlocutory appeals); Nat'l

Asbestos Workers Med. Fund v. Philip Morris Inc., 23 F.Supp.2d 321 (E.D.N.Y. 1998) (motion to dismiss various theories denied as premature without development of facts); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., No. 98-CV-1492, 1998 WL 372410 (E.D.N.Y. Jul. 2, 1998) (motion to change venue denied as premature); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1880303 (E.D.N.Y. Dec. 27, 2000) (New York General Business Law § 349(h) and § 350-e Private recoveries not retroactive before 1980); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1880305 (E.D.N.Y. Dec. 27, 2000) (limitations on number of experts and use of their depositions); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1804542 (E.D.N.Y. Dec. 4, 2000) (foundations for documents); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1804602 (E.D.N.Y. Nov. 30, 2000) (motions in limine); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1737941 (E.D.N.Y. Nov. 21, 2000) (motions in limine); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1370437 (E.D.N.Y. Sept. 21, 2000) (holding company denied as to manufacturers' enterprise but granted as to parent / subsidiary theory); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1336697 (E.D.N.Y. Sept. 15, 2000) (Individual smoker testimony as well as statistical data admissible); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1292671 (E.D.N.Y. Sept. 8, 2000) (Daubert motions); Falise v. Am. Tobacco Co., 107 F.Supp.2d 200 (E.D.N.Y. 2000) (Daubert analysis); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1144697 (E.D.N.Y. July 25, 2000) (In limine motions); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1010982 (E.D.N.Y. July 19, 2000) (in limine motions); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 1010978 (E.D.N.Y. July 18, 2000) (in limine motions); Falise v. Am. Tobacco Co., 94 F.Supp.2d 316 (E.D.N.Y. 2000) (limited theories on which trust could recover; other claims dismissed); Falise v. Am. Tobacco

Co., No. 99-CV-7392, 2000 WL 433097 (E.D.N.Y. Apr. 18, 2000) (scheduling orders); Falise v. Am. Tobacco Co., 91 F.Supp.2d 525 (E.D.N.Y. 2000) (RICO action date of accrual for asbestos-related claims); Falise v. Am. Tobacco Co., No. 99-CV-7392, 2000 WL 264332 (E.D.N.Y. Jan. 24, 2000) (Nos. CV-98-1492, CV-97-7658, CV-98-3287, CV-98-675) (documents not subject to attorney-client privilege after congressional release on internet); Falise v. Am. Tobacco Co., 193 F.R.D. 73 (E.D.N.Y. 2000) (published documents would not be deemed privileged); Falise v. Am. Tobacco Co., 241 B.R. 63 (E.D.N.Y. 1999) (once bankruptcy plan confirmed and substantially consummated district court lost jurisdiction); Falise v. Am. Tobacco Co., 241 B.R. 48 (E.D.N.Y. 1999) (district court had no independent jurisdiction over case based on bankruptcy); Falise v. Am. Tobacco Co., No. 99-CV-7392, 1999 WL 98626 (E.D.N.Y. Feb. 18, 1999) (Nos. 97-CV-7640, 97-CV-7658, 98-CV-675) (motion to dismiss denied based on possible joint liability of cigarette and asbestos industries); Falise v. Am. Tobacco Co., No. 97-CV-7640, 1998 WL 372401 (E.D.N.Y. July 2, 1998) (jurisdiction over foreign holding company); Bergeron v. Philip Morris Inc., 100 F.Supp.2d 164 (E.D.N.Y. 2000) (further discovery required to determine if Massachusetts or New York law applied); Bergeron v. Philip Morris Inc., No. 99-CV-6142, 2000 WL 748144 (E.D.N.Y. June 8, 2000) (cooperative discovery among related cases); H.K. Porter Co., Inc. v. Am. Tobacco Co., 71 F.Supp.2d 73 (E.D.N.Y. 1999) (certification of narrower class action denied in favor of one more comprehensive); In re Tobacco Litig., 193 F.R.D. 92 (E.D.N.Y. 2000) (settlement process and questions for discussion); In re Tobacco Litig., 192 F.R.D. 90 (E.D.N.Y. 2000) (consolidation for possible settlement and special settlement masters); In re Simon II Litigation, 172 F.Supp.2d 375 (E.D.N.Y. 2001) (test cases rather than class trials); In re Simon (II) Litig., Nos. 00-CV-5332, 98-CV-0675, 99-CV-6142, 98-

CV-1492, 97-CV-7658, 99-CV-1988, 98-CV-3287, 99-CV- 7392, 2000 WL 1252182 (E.D.N.Y. Sept. 6, 2000) (relations between certification and trial of punitive and compensatory claims).

III. Order

The court certifies a punitive damages non-opt-out class pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure. The class consists of:

All persons residing in the United States, or who were residents of the United States at the time of their deaths, who smoke or smoked Defendants' cigarettes, and who were first diagnosed by a physician with one or more of the following diseases from April 9, 1993 through the date notice to the class is ordered disseminated: lung cancer; laryngeal cancer; lip cancer; tongue cancer; mouth cancer; esophageal cancer; kidney cancer; pancreatic cancer; bladder cancer; ischemic heart disease; cerebrovascular heart disease; aortic aneurysm, peripheral vascular disease; emphysema; chronic bronchitis; or, chronic obstructive pulmonary disease (also called chronic air flow obstruction).

The following persons are excluded from the class:

1. Persons who have obtained judgments or settlements against any or all Defendants;
2. Persons against whom any or all of the Defendants have obtained judgments;
3. Persons who are members of the certified class in Engle v. R.J. Reynolds Tobacco Co. No. 94-08273 CA-22 (Circuit Court of the 11th Judicial Circuit, Dade County, Florida);
4. Persons who should have first reasonably realized that they had the disease prior to April 9, 1993; and
5. Persons whose diagnosis or reasonable basis for knowledge predates their use of

tobacco.

The court finds that each of the necessary elements of Rule 23 of the Federal Rules of Civil Procedure is satisfied.

The class is represented by leading members of the United States plaintiff mass tort bar. Defense counsel are leading members of the tobacco defense bar.

The following Plaintiffs are designated as Class Representatives: Ellis Simon, Trudy Hunt, Tony Younany, George Oko, Jacqueline Houchell, Sylvia Wohl, George E. Patterson, represented by Plaintiff Estate of George Patterson, Estate of Willie Grier, Estate of Joyce Fogliano, Estate of Virginia Overstreet, Estate of Evelyn Schrieber, Estate of Stanley Kesselman, and James Ebert.

The following counsel are designated as Class Counsel: Elizabeth J. Cabraser, Perry Weitz, M. Frederick Pritzker, Norwood Wilner, Stanley M. Chesley, Dianne M. Nast and their respective law firms. Elizabeth J. Cabraser is appointed as lead counsel.

The class is not seeking compensatory damages. Claims of individual class representatives for compensatory damages will be tried.

The trial will proceed in three stages. The first stage will be before a jury directed to make a class-wide determination of liability and estimated total value of national undifferentiated compensatory harm to all members of the class. This sum will not be awarded but will serve as a predicate in determining non-opt-out class punitive damages. If the jury finds no substantive basis for compensatory claims of the class on a theory permitting an award of punitive damages, there will be no need for a second stage.

Compensatory awards, if any, for individual class representatives will be determined by

the same jury.

At the second trial stage, the same jury will determine whether the defendants engaged in conduct warranting punitive damages. If the jury finds no conduct warranting punitive damages, there will be no need for a third stage.

At the third stage the same jury will determine the amount of punitive damages to be awarded the class and how the damages will be allocated, on a disease-by-disease basis. The court and counsel will ensure, through control of trial and pretrial practice, that the jury receives relevant information as to each disease. Thus subclassing by disease is not required.

The court will distribute sums to the class on a pro rata basis by disease to those members of the class submitting appropriate proof. Any portion not so distributed will be allocated by the court on a cy pres basis to treatment and research organizations working in the field of each disease on advice of experts in the fields.

The jury will apply New York law according to principles of conflicts of laws.

Discovery is to go forward as directed by the Magistrate Judge. To avoid unnecessary expense, the parties will not notify the class now — even though an adequate preliminary plan for such notification has been provided by plaintiffs — since the court of appeals may deny or require alteration of the certification order and the plans for trial and disposition of any award.

The court was not presented with, and therefore did not rule upon a compensatory class. The certification of a class for determination of compensatory damages to be distributed using an appropriate matrix would be possible and might be desirable in coordination with the class now certified. Plaintiffs chose the more limited approach of a punitive class only, now approved, which might be considered more conservative.

This Order will be effective upon filing. The court recommends that the court of appeals entertain an appeal pursuant to Rule 23(f) of the Federal Rules of Civil Procedure.

The trial is set for January 20, 2003, at 10:00 A.M. The jury will be selected with the assistance of a written questionnaire. In limine motions are returnable on January 6, 2003, at 10:00 A.M. Motions may be scheduled at a different time after consultation among counsel and with Ms. June Lowe, case coordinator. Appellate procedure may require postponements which will be granted on letter request.

Within thirty days of the date of this order, or, if the court of appeals for the Second Circuit accepts an appeal of this order, then within thirty days of the date appellate procedures are completed, class counsel will submit a proposed plan for the dissemination of notice of the pendency of this action to the class (including all proposed forms of notice).

If the court of appeals requires modification, the court will consider alternative methods of class certification and trial. Some of these alternatives will be examined in the memorandum which will follow.

SO ORDERED.

Jack B. Weinstein
Senior United States District Judge

Dated: Brooklyn, N.Y.
September 19, 2002